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STATE OF MONTANA**

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May 14, 2002



Department of Justice
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Senator Max Baucus
511 Hart Senate Office Building
United States Senate
Washington, D.C. 20510-2602

Dear Max:

I am writing to express my concern about the evolving language of H.R. 3005, the "Bipartisan Trade Promotion Authority Act of 2002." I understand that you intend to offer an amendment to your bill that would direct United States trade negotiators to adopt, as one of the trade negotiating objectives, ensuring that "foreign investors in the United States are not accorded greater rights than U.S. investors in the United States." I applaud this positive change in the bill, but remain concerned that the amendment would not be adequate to protect U.S. sovereign interests and preserve the authority of the U.S. government at all levels to enact and enforce reasonable measures to protect the public welfare.

The fundamental difficulty lies in the fact that United States' law itself is subject to a variety of conflicting interpretations. Assuming foreign arbitration panels would be willing to attempt to enforce U.S. legal standards, as opposed to international legal rules, the question remains: how would they interpret U.S. law and what would be the remedy if they misinterpreted U.S. law? Foreign arbitrators commonly would not be U.S. citizens and would not be trained in U.S. law and, therefore, would not likely be competent to interpret and apply U.S. law. In addition, panel members would possess none of the basic attributes of judicial independence which we demand of judges on United States federal and state courts; arbitrators would apparently be selected on a case by case basis and, unlike federal judges, for example, could maintain extensive private legal practices while serving as arbitrators. Whereas federal judges are selected by the President with the advice and consent of the Senate, panel members would presumably be chosen, as under NAFTA, through a combination of selections by the foreign claimants themselves, mid-level officials in the federal agencies, and international institutions such as the United Nations or the World Bank.

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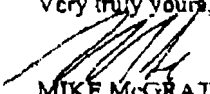
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Furthermore, the decisions of the arbitration panels would not be subject to meaningful review by U.S. courts while, on the other hand, these panels would have the authority to declare U.S. court rulings in violation of international law and grant foreign investors monetary damages against the United States based on U.S. court rulings. In short, under this regime, foreign arbitration panels, composed largely of non-U.S. citizens and non-U.S. lawyers, would become the courts of last resort to resolve domestic legal issues of vital importance to all Americans.

I recommend that you support further efforts to improve the pending trade bill. In particular, I urge you to support efforts to ensure that foreign investors cannot invoke the investor-state mechanism to challenge rulings by our federal and state courts. I frankly believe an overwhelming majority of the American people and Montanans would react with outrage to the idea that an otherwise final and definitive ruling of our domestic courts could be reviewed by foreign arbitration panels and could provide the basis for money claims against United States taxpayers. Secondly, I urge you to support efforts to establish an effective mechanism to empower our courts to overturn foreign arbitration awards against the United States if and when the panels issue decisions that are inconsistent with our laws as interpreted by the United States Supreme Court and the highest state courts.

Thank you for consideration of these concerns.

Very truly yours,



MIKE McGRATH
Attorney General

MM/bmm/hrf